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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1441

RICHARD X. CONNORS, et al.,

Petitioners,

—against—

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION and THE UPJOHN COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

The sole ground on which the District Court dismissed petitioners' complaint was that petitioners were bound by the judgment entered in settlement of *Virginia* v. *Chas. Pfizer & Co., Inc.*,* and that petitioners could not attack that

* 68 Civ. 5140 (S.D.N.Y.). The judgment entered in settlement of the Virginia action was one of 66 judgments entered in actions brought by 43 states, and several municipalities and wholesale and retail pharmacies to dispose of the major portion of the antibiotic antitrust litigation. The opinion approving the settlement of these cases is reported as West Virginia *v.* Chas. Pfizer & Co., Inc., 314 F.Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971), *rehearing denied.*

judgment collaterally in this action, after having appeared and participated as members of a class established in the *Virginia* action:

> "The indisputable fact is that those six plaintiffs [petitioners here] were fully and fairly represented by their attorney, Mr. Paul Scanlon, at the hearing held in New York on March 25, 1970 to determine whether or not the proposed settlement should be approved.
>
> "When Judge Wyatt finally approved the settlement, Mr. Scanlon filed a notice of appeal but later decided that an appeal was not the proper procedure to attack the validity of the settlement and chose instead, to press the matter collaterally through this action. *Hansberry* compels the dismissal of this action. Since these plaintiffs, through their counsel actually participated in the hearing before Judge Wyatt, they are bound by the judgment in the Virginia Class Action, subject of course, to attack by direct appeal to the appropriate court." (Pet., App. 82; 333 F.Supp. 296, 298)

The Second Circuit affirmed the dismissal on the basis of the District Court's decision. (Pet., App. 83; 450 F.2d 1119)

The eight "Questions Presented" as set forth in the petition are clearly inappropriate, and simply represent a further effort to attack collaterally the *Virginia* judgment.

Consequently, the only issue presented by this petition is:

> Whether any question appropriate for review by this Court is presented by the District Court's decision dismissing petitioners' complaint on the ground that petitioners are bound by the judgment disposing of their claims in another action in which, as members of a plaintiff class created pursuant to Fed. R. Civ. P. 23, they appeared individually and were heard prior to the entry of judgment.

STATEMENT OF CASE

Petitioners have never contested the facts that they (1) appeared as members of a class established in the *Virginia* action, in which Virginia asserted the same claims which petitioners assert in this case, (2) raised objections to the proposed settlement of the class action and were heard on those objections, and (3) elected not to appeal directly from the judgment entered in the *Virginia* action approving that settlement and dismissing their claims and have instead attempted to use this action as a vehicle for collateral attack on that judgment.

The Virginia Action

In December, 1968, the Commonwealth of Virginia commenced an action on behalf of itself and "all individual consumers within the Commonwealth" against the five respondents herein, alleging conspiracy to restrain and monopolize trade and commerce in broad spectrum antibiotics (A. 23-27).* The Judicial Panel for Multidistrict Litigation, under 28 U.S.C. § 1407, coordinated the *Virginia* action with a number of other similar actions for pretrial proceedings in the Southern District of New York before Judge Inzer B. Wyatt.

Defendants' Settlement Proposal

On February 6, 1969, respondents offered to settle the claims of all consumers, including all those residing in Virginia. Virginia and forty-two other states accepted that settlement proposal.

* Citations to the Joint Appendix filed below with the Court of Appeals for The Second Circuit are noted as "A."

The Establishment and Maintenance of the Consumer Class in the Virginia Action

On May 26, 1969, the District Court ordered that the *Virginia* action be maintained as a statewide class action on behalf of, "all members of the consuming public who have purchased broad spectrum antibiotic products in the state. . . ." (A. 165a-170a). Thereafter, pursuant to court order, a Rule 23(c)(2) notice directed to Virginia consumers was published in twenty-eight newspapers in Virginia and three newspapers in Washington, D.C. The notice advised each person that if he did not opt out of the class by August 1, 1969, he would be "included in such class and any judgment whether favorable or not, including any judgment approving any settlement of this action, will be binding upon you" (A. 98).

The six petitioners, all residents of Virginia, have never suggested that they did not in fact receive this notice, and none elected to exercise his right to opt out of the *Virginia* class.

Petitioners' Commencement of this Action

Several months after the expiration of time to opt out of the *Virginia* consumer class, petitioners on February 16, 1970, filed their complaint in the Eastern District of Virginia, on their own behalf and on behalf of all consumers in the United States, asserting the very same antitrust claims against defendants as those alleged in the *Virginia* complaint (A. 6-20). The Judicial Panel for Multidistrict Litigation transferred this action to the Southern District of New York, and on December 2, 1970, reassigned the case and all other "non-settling cases" to the Honorable Miles W. Lord, sitting by designation in the Southern District of New York.

Petitioners' Appearance Pursuant to Notices in the Virginia Action

In the proceedings in the *Virginia* action, a second round of notices was published on February 24, 1970 notifying members of the consumer class that hearings would be held before Judge Wyatt to determine whether the proposed compromise and settlement should be approved by the Court under Fed. R. Civ. P. 23(e) (A. 99).

In response to that notice, petitioners, through their counsel, Paul D. Scanlon, Esq., filed a timely notice of appearance, appeared at the hearing held before Judge Wyatt and were heard at length (A. 42-43, 107-158). At the outset of his presentation, Mr. Scanlon advised the court that petitioners were members of the *Virginia* consumer class (A. 108). In both oral argument and briefs, petitioners raised substantially the same objections to the settlement of the *Virginia* action that they now seek to have this Court review collaterally in this action.

The Final Order and Judgment In the Virginia Action

On June 24, 1970, Judge Wyatt issued an opinion approving the settlement in 66 actions including the *Virginia* action, *West Virginia* v. *Chas. Pfizer & Co., Inc.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 404 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971), and on September 29, 1970, entered a final order and judgment under Fed. R. Civ. P. 54(b) in the *Virginia* action dismissing with prejudice as to respondents all claims of "all individual members of the consuming public" in Virginia ". . . (1) arising out of purchases of broad spectrum antibiotic products . . . or (2) arising, in whole or in part, out of any of the matters, things or events alleged in the complaint herein" (A. 38-39). That judgment covers the claims asserted by petitioners in these actions.

Petitioners' Election Not to Appeal the Judgment Approving the Settlement

Several class members in the settling cases appealed the judgments entered by Judge Wyatt to the Second Circuit and raised many of the issues which these petitioners now seek to assert again. The Second Circuit affirmed Judge Wyatt's decision, and the various class members petitioned this Court for a writ of *certiorari*. This Court denied the petition. *West Virginia v. Chas. Pfizer & Co., Inc.*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971).

These six petitioners, although they had filed a premature appeal from Judge Wyatt's opinion in July 1970 which the Second Circuit dismissed without prejudice since judgment had not then been entered,* elected not to appeal the judgment of dismissal of the *Virginia* action when it was entered. Indeed, counsel for petitioners, in support of a motion to re-transfer this action (and other non-settling actions) to the District of Minnesota, told the Judicial Panel for Multidistrict Litigation that petitioners could, but would not, appeal the judgment dismissing the *Virginia* action because they wanted a court other than the Second Circuit to review the setlement and the judgment entered in the *Virginia* action (A. 242-246).

The Order Below Dismissing Petitioners' Complaint, and the Second Circuit's Affirmance

On January 12, 1971 defendants moved the District Court for summary judgment on the ground that the claims asserted by petitioners' complaint were barred by the final order and judgment entered in the *Virginia* action. The District Court (Lord, J.) granted that motion on April 5, 1971 and dismissed petitioners' action, ruling that peti-

* West Virginia v. Chas. Pfizer & Co., Inc., No. 35215-18 (2d Cir. Aug. 6, 1970).

tioners, having been active participants in the *Virginia* action, could not thereafter collaterally attack the judgment. The Court of Appeals for the Second Circuit affirmed. *Connors* v. *Chas. Pfizer & Co., Inc.*, 333 F. Supp. 296 (S.D.N.Y.), *aff'd*, 450 F.2d 1119 (2d Cir. 1971), *rehearing denied*.

The Filing of the Petition for Certiorari

The judgment of the Second Circuit was entered on November 12, 1971, and a petition for rehearing was denied on January 4, 1972. The petition for a writ of *certiorari* was filed with this Court on May 4, 1972, following an order granting an extension of time to petitioners "without prejudice to the timeliness of their request."*

ARGUMENT

Petitioners had notice and were heard in the *Virginia* action, and they cannot attack the validity of the *Virginia* judgment in another action. They have had their day in court on all of the objections to the settlement which their petition seeks to resurrect.

Parties who have appeared in an action cannot collaterally attack a judgment rendered in that action. They must appeal, and prevail on appeal, or the judgment will be bind-

* Petitioners did not timely file an application for an extension of time in which to file a petition for a writ of *certiorari* to the Court of Appeals for the Second Circuit. Supreme Court Rule 34-2 requires that all applications for an extension of time be filed at least 10 days before the expiration of the period sought to be extended. Petitioners, herein, filed their application for an extension of time four days before the expiration date for filing a petition for a writ of *certiorari*, and they did not present, in their application, any extraordinary circumstances to justify their tardy filing of the application.

ing on them. *Durfee* v. *Duke*, 375 U.S. 106 (1963); *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931).*

Petitioners rely heavily (Pet., 11, 14, 17) on *Hansberry* v. *Lee*, 311 U. S. 32 (1940). But that case certainly does not suggest that parties may collaterally attack a judgment entered in a class action in which they appeared and took advantage of their opportunity to be heard:

> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, *or where they actually participate in the conduct of the litigation* in which members of the class are present as parties. . . ." (311 U.S. at 42-43) (emphasis added)

Since petitioners here were not "absent," but did appear and did "actually participate" in the *Virginia* proceedings, their reliance on *Hansberry* is misplaced.

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* Petitioners now contend for the first time that the judgment in the Virginia action does not bar their claims here, because the issues of alleged patent fraud and price fixing were not adjudicated and the final judgment in the Virginia action was not entered on the merits (Pet. at 8-9). This position is without any substance. Those issues were among those alleged in the complaint in the Virginia action and perforce disposed of in the settlement of that action. There is no question that a judgment entered in a settlement is binding. Stella v. Kaiser, 218 F.2d 64 (2d Cir. 1954), *cert. denied*, 350 U. S. 835 (1955). Furthermore, a judgment entered in a class action maintained pursuant to Fed. R. Civ. P. 23(b)(3) is conclusive upon all class members who have not "opted-out" of the class. *See* Lawlor v. National Service Corp., 349 U. S. 322 (1955); Advisory Committee Note of 1966 on Rule 23(c)(3).

CONCLUSION

There is no question presented in this case which the Court should review. The dismissal below rested squarely on settled principles of estoppel by judgment, and accordingly the petition for a writ of *certiorari* to the United States Court of Appeals for the Second Circuit should be denied.

Dated: New York, New York
June 5, 1972

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